

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

TRACY DENNIS, ) 3:07-CV-00064-ECR-RAM  
Plaintiff, )  
v. ) **ORDER**  
MICHAEL ASTRUE, )  
Commissioner of Social )  
Security Administration, )  
Defendant. )

Plaintiff Tracy Dennis filed this action on February 9, 2007, challenging the decision of the Commissioner to deny her Title II Disability Insurance Benefits. Currently before the Court are cross-motions for summary judgment. (##7, 10.) For the reasons set out below, Plaintiff's motion for summary judgment (#7) is **GRANTED** and Defendant's motion for summary judgment (#10) is **DENIED**.

**I. BACKGROUND**

Plaintiff applied for benefits on March 30, 2004, asserting in her application that she suffers from disabling back pain, fatigue, severe colitis, and depression. She has also alleged that she has

1 arthritis, and as a result of a severe auto accident on February 2,  
2 2005 (i.e., after her application), she also suffers from  
3 migraines. She alleges a disability onset date of November 2,  
4 2002. Plaintiff has a highschool education and work experience as  
5 a waitress, a saw mill worker, a slotter, and a pulp mill worker.  
6 (AR 76.) In 2003, she worked for two days in one of her sister's  
7 restaurants, but stated that she could not continue working as a  
8 result of her disability. (AR 620.) At the time of her initial  
9 application, Plaintiff was 38 years old.

10 Plaintiff's application was denied on July 23, 2004, and her  
11 request for reconsideration was denied on August 18, 2004. On  
12 April 24, 2006, the matter of her application was heard before an  
13 Administrative Law Judge (ALJ). The ALJ did not take testimony  
14 from a vocational expert nor from any medical experts. On July 28,  
15 2006, the ALJ issued a decision finding that Plaintiff is not  
16 disabled.

17 Plaintiff argues that the ALJ improperly discredited her  
18 testimony, used an inaccurate residual functional capacity ("RFC")  
19 assessment, and improperly failed to call a vocational expert to  
20 meet the Commissioner's burden at step 5. Defendant argues that  
21 there was no legal error in the ALJ's reasoning, and that the  
22 decision was grounded in substantial evidence. The Court has  
23 received the Report and Recommendation (#12) of the Magistrate  
24 Judge, which recommends that the Court affirm the decision of the  
25 ALJ. Plaintiff has filed an Objection (#13) to the Report and  
26 Recommendation, and Defendant has filed a Response (#14) to the

1 Objection. The Court will not adopt the Report and Recommendation  
2 for the reasons set out below.

## 3 4 **II. STANDARD OF REVIEW**

5 The decision of an Administrative Law Judge (ALJ) will be  
6 affirmed if free of legal error and supported by substantial  
7 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).  
8 "Substantial evidence means such relevant evidence as a reasonable  
9 mind might accept as adequate to support a conclusion." Morgan v.  
10 Commissioner of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
11 1999). It is "more than a mere scintilla but less than a  
12 preponderance." Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir.  
13 1998); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "In  
14 determining whether the Commissioner's findings are supported by  
15 substantial evidence, [this Court] must review the administrative  
16 record as a whole, weighing both the evidence that supports and the  
17 evidence that detracts from the Commissioner's conclusion."  
18 Reddick, 157 F.3d at 720. "If the evidence can reasonably support  
19 either affirming or reversing the [Commissioner's] conclusion, the  
20 court may not substitute its judgment for that of the  
21 [Commissioner]." Id. at 720-21.

## 22 23 **III. ANALYSIS**

24 The Commissioner follows a five-step sequential evaluation  
25 process in assessing whether a claimant is disabled:

26 Step one: Is the claimant engaging in substantial gainful  
27 activity? If so, the claimant is found not disabled. If not,  
28 proceed to step two. Step two: Does the claimant have a

1 "severe" impairment? If so, proceed to step three. If not,  
2 then a finding of not disabled is appropriate. Step three:  
3 Does the claimant's impairment or combination of impairments  
4 meet or equal an impairment listed in 20 C.F.R., Pt. 404,  
5 Subpt. P, App.1? If so, the claimant is automatically  
6 determined disabled. If not, proceed to step four. Step  
7 four: Is the claimant capable of performing his past work?  
8 If so, the claimant is not disabled. If not, proceed to step  
9 five. Step five: Does the claimant have the residual  
10 functional capacity to perform any other work? If so, the  
11 claimant is not disabled. If not, the claimant is disabled.

12 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (summarizing  
13 20 C.F.R. § 404.1520). If, as here, the claimant shows an  
14 inability to perform past relevant work at "step four," a prima  
15 facie case of disability is established and at "step five" the  
16 burden shifts to the Commissioner to show that the claimant can  
17 perform work that exists in "significant numbers" in the national  
18 economy, taking into consideration the claimant's residual  
19 functional capacity, age, education, and work experience. Andrews  
20 v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). Here, the ALJ  
21 utilized "the grids" to meet this burden. See 20 C.F.R., Pt. 404,  
22 Subpt. P, App. 2.

23 "Generally, a claimant's credibility becomes important at the  
24 stage where the ALJ is assessing residual functional capacity,  
25 because the claimant's subjective statements may tell of greater  
26 limitations than can medical evidence alone." Tonapetyan v.  
27 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001). A credibility  
28 determination regarding subjective ailments requires a two-step  
analysis. "First, the ALJ must determine whether the claimant has  
presented objective medical evidence of an underlying impairment  
'which could reasonably be expected to produce the pain or other  
symptoms alleged.'" Lingenfelter v. Astrue, 504 F.3d 1028, 1036

1 (9th Cir. 2007) (quoting Bunnell v. Sullivan, 947 F.2d 341, 344  
2 (9th Cir. 1991) (en banc)). Once the claimant produces medical  
3 evidence of an underlying impairment that is reasonably likely to  
4 produce the claimed symptoms, the Commissioner may not discredit  
5 the claimant's testimony as to those subjective symptoms merely  
6 because they are unsupported by objective evidence. Lingenfelter,  
7 504 F.3d at 1035-36; Tonapetyan, 242 F.3d at 1147-48; Bunnell, 947  
8 F.2d at 345-46. Absent affirmative evidence of malingering, the  
9 reasons given for rejecting the claimant's statements must be  
10 specific, clear, and convincing. Orn v. Astrue, 495 F.3d 625, 635  
11 (9th Cir. 2007); Tonapetyan, 242 F.3d at 1148-49.<sup>1</sup> "Factors that  
12 an ALJ may consider in weighing a claimant's credibility include  
13 reputation for truthfulness, inconsistencies in testimony or  
14 between testimony and conduct, daily activities, and 'unexplained,  
15 or inadequately explained, failure to seek treatment or follow a  
16 prescribed course of treatment.'" Orn, 495 F.3d at 636 (quoting  
17 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

18 The ALJ did not examine any of these factors. Instead, the  
19 ALJ simply reasoned that "the degree of chronic pain alleged" was  
20 not sufficiently substantiated by the objective evidence. (AR 32.)

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22 <sup>1</sup>The Ninth Circuit derived this standard from Social Security  
23 Ruling 96-7p. See Tonapeytan, 242 F.3d at 1147. The ALJ explicitly  
24 cited Security Ruling 96-7p in his decision. Both the ALJ and the  
25 Magistrate Judge noted in passing that there have been recent  
26 amendments to 20 C.F.R. § 404.1529, but it appears that these  
27 amendments do not affect the legal standard; Defendant has not argued  
28 that Bunnell is not controlling. See Orn, 495 F.3d at 635-36; 20  
C.F.R. § 404.1529(c) (2) ("we will not reject your statements about the  
intensity and persistence of your pain or other symptoms or about the  
effect your symptoms have on your ability to work solely because the  
available objective medical evidence does not substantiate your  
statements").

1 On this basis, the ALJ found that Plaintiff was able to undertake  
 2 sedentary work. We agree with the Magistrate Judge that there is  
 3 no evidence of malingering, and that the record clearly indicates  
 4 medical impairments that could reasonably be expected to produce  
 5 the symptoms of which Plaintiff complains. See Lingenfelter, 504  
 6 F.3d at 1036 ("The claimant . . . 'need not show that her  
 7 impairment could reasonably be expected to cause the severity of  
 8 the symptom she has alleged; she need only show that it could  
 9 reasonably have caused some degree of the symptom.'") (quoting  
 10 Smolen, 80 F.3d at 1282). The nature of the symptoms, and to a  
 11 great extent their degree, are abundantly supported not only by the  
 12 diagnoses of the treating physicians but also by the number and  
 13 nature of the medications that were prescribed and administered to  
 14 Plaintiff by her treating physicians.<sup>2</sup>

15 This is not to say that the objective medical evidence was  
 16 entirely consistent. Dr. Singh's letters, for example, stated:

17 I believe the patient is disabled as a result of the above  
 18 pain. [ ¶ ] Diagnoses:

- 19 1. From pain management view, lumbar spondylosis.
- 20 2. Discogenic disease of the lumbar spine.
- 21 3. Severe colitis.

22 The patient is unable to work at her usual job of waitress as  
 23 she has hard [sic] time in carrying heavy plates and being  
 24 upright at the same time. [ ¶ ] Recommendation: My  
 25 recommendation would be that the patient is disabled at this  
 26 time.

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27 <sup>2</sup>We note that the number and nature of the medications prescribed  
 28 to Plaintiff is evidence that the ALJ seems to have substantively  
 ignored. See Social Security Ruling (SSR) 96-7p (1996) (the  
 adjudicator "must consider . . . 4. The type, dosage, effectiveness,  
 and side effects of any medication"); 20 C.F.R. § 404.1529(c)(3)(iv)  
 (same). The ALJ made only one passing reference to the fact that  
 Plaintiff had been prescribed methadone, and otherwise merely noted  
 if there was a physician's chart note stating that the pain treatment  
 was effective.

1  
2 (AR 161, 162.) Other physicians found no evidence of  
3 spondylosisthesis, and either found no spondylosis or made no  
4 mention of it. (AR 27, 181.) That said, however, Plaintiff had  
5 very clearly met step one, and it was legal error simply to  
6 discredit the claimant's testimony solely on the basis of the  
7 objective medical evidence. Lingenfelter, 504 F.3d at 1036.  
8 Defendant cites Tidwell v. Apfel, 161 F.3d 599 (9th Cir. 1998), but  
9 that case provides no support for Defendant in this case. There,  
10 the ALJ found the claimant not credible for multiple reasons, and  
11 the ALJ did not rely solely on the objective medical evidence. Id.  
12 at 602.

13 In recommending that the Court affirm, the Magistrate Judge  
14 appears to have reasoned that Plaintiff was temporarily, but not  
15 permanently disabled. Indeed, the record reveals that Plaintiff's  
16 various physicians prescribed large amounts of powerful pain  
17 medications prior to administering three epidural injections to her  
18 spine, and that she subsequently reported some amount of relief as  
19 a result of these injections. (AR 493.)<sup>3</sup> Ultimately, however, if  
20 the ALJ was relying on the chronology and evolution of Plaintiff's  
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24 <sup>3</sup>It was around this time that Plaintiff's chart notes at Spine  
25 Nevada began to state "FCE: sedentary limits, 10 lbs lifting max."  
26 (AR 461.) In addition, however, completely contrary to the ALJ's  
27 findings that colitis had effectively become a non-issue that could  
28 be excluded from Plaintiff's RFC, the same treatment notes indicate  
that Plaintiff was having renewed intestinal flare ups. (AR 493; AR  
499.)

1 ailments, he failed to so state,<sup>4</sup> and he also failed to inquire  
2 about the evolution of Plaintiff's ailments in relation to  
3 Plaintiff's testimony at the evidentiary hearing. Where, as here,  
4 there is sufficient evidence at step one, no controlling precedent  
5 suggests that an ALJ may rely solely on the objective evidence at  
6 step two. See Lingenfelter, 504 F.3d at 1036.

7 Defendant takes the position that the discussion of daily  
8 activities in the ALJ's decision indicates that the ALJ did not  
9 rely solely on the objective medical evidence. However, the ALJ's  
10 discussion of Plaintiff's daily activities added nothing to his  
11 credibility assessment. The Ninth Circuit has quite recently  
12 reiterated that daily activities cannot simply be cited as  
13 inherently detracting from a plaintiff's credibility. See Orn, 495  
14 F.3d at 639. Instead, daily activities may be the basis of an  
15 adverse credibility determination in two ways: they may either (1)  
16 contradict other testimony, or (2) reveal abilities that are  
17 "transferable" to the workplace. Id. Just as reasons for  
18 discrediting a claimant's statements must be specific, an ALJ must  
19 make specific findings related to the transferability of daily  
20 activities to a work setting. Id.

21 The ALJ commented that Plaintiff's activities were consistent  
22 with his own findings (AR 32); he did not, however, cite any  
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24 <sup>4</sup>This Court is "constrained to review the reasons the ALJ  
25 asserts. It [is] error for the district court to affirm the ALJ's  
26 credibility decision based on evidence that the ALJ did not discuss."  
27 Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003) (citations  
28 omitted; modification supplied); see also Pinto v. Massanari, 249 F.3d  
840, 847-8 (9th Cir. 2001) (citing S.E.C. v. Chenery Corp., 332 U.S.  
194, 196 (1947)).



1 inconsistency in Plaintiff's testimony or conduct. The ALJ's  
2 comment that Plaintiff's activities "indicate an ability to perform  
3 sedentary activity," (AR 32), can be construed as an implicit  
4 finding that her activities were "transferable" to the work place.  
5 But in reviewing the record, it becomes clear that, rather than  
6 supporting the ALJ's credibility finding, the ALJ's analysis of  
7 Plaintiff's daily activities simply took that finding for granted.  
8 Plaintiff testified that her home activities are confined to "some  
9 baking," picking things up, the laundry with some help, and making  
10 the bed. Plaintiff stated that she would crochet "just very small  
11 bits at a time." (AR 631.) She also testified that she drives her  
12 children to school in the morning. There is no evidence in the  
13 record regarding how long a drive this is. She also testified that  
14 she has virtually no social activities outside the home and that  
15 she no longer goes to church, but that she might go to one of her  
16 children's softball games if the weather was warm. There is no  
17 evidence in the record of how frequent this would be or what it  
18 would entail, other than Plaintiff's statement that she would sit  
19 in the truck with a blanket if the weather was cold. Finally, she  
20 testified that she would go shopping, but only with the assistance  
21 of her family. To the extent that the ALJ suspected that  
22 Plaintiff's enumerated activities were inherently transferable to  
23 the workplace, he failed to develop the record and make specific  
24 findings to support this conclusion. There is no inherent  
25 irreconcilability between Plaintiff's daily activities and her  
26 testimony regarding her disability. See Orn, 495 F.3d at 639  
27 (rejecting credibility assessment because of a lack of evidence  
28

1 that the activities were "transferable" and because of lack of  
2 evidence that the claimant spent a "substantial" part of the day  
3 engaged in those activities); Fair, 885 F.2d at 603 ("The Social  
4 Security Act does not require that claimants be utterly  
5 incapacitated to be eligible for benefits . . . and many home  
6 activities are not easily transferable to what may be the more  
7 grueling environment of the workplace, where it might be impossible  
8 to periodically rest or take medication.") (citations omitted);  
9 Gallant v. Heckler, 753 F.2d 1450, 1453, 1457 (9th Cir. 1984)  
10 (ordering award of benefits for constant back and leg pain where  
11 the claimant cooked and did the dishes). Cf. Tonapeytan, 242 F.3d  
12 at 1150 ("The ALJ in a social security case has an independent duty  
13 to fully and fairly develop the record and to assure that the  
14 claimant's interests are considered.") (internal quotation marks  
15 omitted).

16 In sum, the ALJ's credibility finding was grounded in legal  
17 error. It is not necessary for the Court to comment on whether the  
18 RFC was incomplete or inaccurate, or whether a vocational expert  
19 was required under the circumstances, except to say that the ALJ's  
20 findings and analysis on these issues depended upon his credibility  
21 assessment.

#### 22 23 **IV. CONCLUSION**

24 The ALJ explicitly stated that he would have found that  
25 Plaintiff was disabled had he credited her testimony. (AR 30.)  
26 There is some doubt regarding whether the doctrine that a  
27 claimant's testimony must be "credited as true" if it has been  
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1 improperly discredited by the ALJ is "mandatory" in the Ninth  
2 Circuit. See Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir.  
3 2003) (noting that the propriety of remanding for reconsideration  
4 of credibility determinations was implicitly approved by the Ninth  
5 Circuit en banc in Bunnell). However, the Ninth Circuit has  
6 recently held that: "When an 'ALJ's reasons for rejecting the  
7 claimant's testimony are legally insufficient and it is clear from  
8 the record that the ALJ would be required to determine the claimant  
9 disabled if he had credited the claimant's testimony,' we remand  
10 for a calculation of benefits." Orn, 495 F.3d at 640 (quoting  
11 Connett, 340 F.3d at 876); see also Lester, 81 F.3d at 834.

12 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Objection  
13 (#13) is **SUSTAINED**. Plaintiff's motion for summary judgment (#7)  
14 is **GRANTED** and Defendant's motion for summary judgment (#10) is  
15 **DENIED**. The matter is **REMANDED** to the Social Security  
16 Administration for the calculation of benefits. The clerk shall  
17 enter judgment accordingly.

18  
19 DATED: This 5th day of March, 2008.

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UNITED STATES DISTRICT JUDGE